

DEPARTMENT OF STATE REVENUE

04-20181381.LOF

10-20181380.LOF

02-20181379.LOF

Letters of Findings Numbers: 04-20181381; 10-20181380; 02-20181379
Corporate Income Tax, Sales Tax, Food and Beverage Tax
For Tax Years 2015-2016

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana restaurant was not able to prove the Department's assessments incorrect. Restaurant was only able to provide documentation for outside the audit timeframe and therefore could not rebut the Department's best information available assessment. Restaurant however was able to provide sufficient documentation to show that it was not negligent and therefore the penalty is abated.

ISSUES

I. Gross Retail and Food & Beverage Taxes—Best Information Available.

Authority: IC § 6-8.1-5-1; IC § 6-9-12-7; IC § 6-9-20-4; IC § 6-2.5-2-1; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); [45 IAC 2.2-6-8](#).

Taxpayer protests the imposition of sales tax as well as the food and beverage tax.

II. Income Tax—Imposition.

Authority: IC § 6-3-2-2.

Taxpayer protests the imposition of income tax.

III. Tax Administration—Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana restaurant. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. The audit resulted in additional sales tax, food and beverage tax, and income tax for the years 2015 and 2016. Taxpayer protested the audit assessment. An administrative hearing was then conducted during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail and Food & Beverage Taxes—Best Information Available.

DISCUSSION

As a threshold issue, it is a taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the

person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a retail sales tax by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state.*
(*Emphasis added*).

Next, IC § 6-9-12-7 states:

The county food and beverage tax shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#). However, the return to be filed for the payment of the county food and beverage tax may be either a separate return or may be combined with the return filed for the payment of the state gross retail tax, as prescribed by the department of state revenue. (Emphasis added).

Therefore, the food and beverage tax is imposed in the same manner as sales tax as provided under the provisions of IC § 6-2.5. IC § 6-9-20-4 provides:

- (a) Except as provided in subsection (c), a tax imposed under section 3 of this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:
 - (1) for consumption at a location, or on equipment, provided by a retail merchant;
 - (2) in the county in which the tax is imposed; and
 - (3) by a retail merchant for consideration.
- (b) Transactions described in subsection (a)(1) include, but are not limited to, transactions in which food or beverage is:
 - (1) served by a retail merchant off the merchant's premises;
 - (2) food sold in a heated state or heated by a retail merchant;
 - (3) two (2) or more food ingredients mixed or combined by a retail merchant for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses); or
 - (4) food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food).
- (c) The county food and beverage tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by [IC 6-2.5](#).

The Department conducted an audit for sales tax and food and beverage tax. The sales tax and food and beverage tax audit resulted in additional sales causing Taxpayer's income to increase, subjecting it to additional income tax due (discussed under Issue II). During the audit, the auditor requested the daily and monthly register tapes, bank statements, and sales reports; only the bank statements were provided by Taxpayer and reviewed by the auditor. The auditor also reviewed Taxpayer's handwritten monthly summary reports that detailed the credit and cash deposits. The audit report stated that:

During the review the auditor found that taxpayer reported 3.89[percent] cash sales in 2015 and 4.08[percent] case sales in 2016. According to Total System Services (TSYS) consumer reports for 2015 and 2016, the cash sales percentages for dine-in restaurants is 22[percent] in 2015 and 18[percent] in 2016 []. Since the

taxpayer was unable to provide daily register tapes or sourcing documentation, the auditor is using the best information available to calculate the unreported cash sales. [IC 6-8.1-5-1\(b\)](#) states if the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of unpaid tax on the basis of the best information available to the department.

The auditor calculated the credit card sales using the bank deposits for each year minus any cash deposits, taxes, and credit card tips. The credit card tips were calculated using the credit card tips from the October 2017 credit card batch reports and dividing the total credit card tips by the total deposit for October 2017. The auditor grossed up the cash sales based on the 22[percent] in 2015 and 18[percent] in 2016 from TSYS consumer reports. The adjustment was made in accordance with [45 IAC 2.2-6-8](#), which defines the tax liability for a retail merchant as the total gross receipts from taxable transactions multiplied by the state tax rate. The auditor applied the same methodology to food and beverage tax as provided in IC § 6-9-20-4. The sales tax and food and beverage tax calculations resulted in additional income, the Department then determined additional income tax due.

Taxpayer protested all three assessments stating that the Department did not take into account mobile payment application. Taxpayer stated, "We believe that it would be more reasonable and fairer to the taxpayer if the cash sales percentage was based on in-store sales figures since the delivery customers paying through the app constitute such a large percentage of the gross." Taxpayer provided the auditor with the spreadsheet which shows the reports with sales broken down to mobile application paid sales and in-store sales, along with the daily batch reports and corresponding mobile application statement for each month. Taxpayer however could not provide the source documentation needed that the auditor had originally asked for.

In addition, all documents provided in the protest were previously provided to the Department during the audit. Taxpayer claimed that its November 2016 sales were able to establish that forty percent of its sales were made through the mobile payment application therefore the Department must show that 60 percent of sales accounted for and apply the industry standard to the remaining forty percent. The auditor looked at October 2017 mobile application payments. The Department however could not verify and match any sales from the different reports to verify the total sales. Taxpayer in this instance has not provided source documentation or evidence to show that its sales were less than what the Department determined during the audit. Taxpayer has not provided sufficient evidence that the Department's assessment of sales and food and beverage tax is incorrect as required by IC § 6-8.1-5-1(c). Therefore, Taxpayer's protest is denied.

FINDING

Taxpayer's protest is denied.

II. Income Tax–Imposition.

The Department determined that Taxpayer had additional sales resulting in additional income tax due. The Department refers to IC § 6-3-2-2(a), which states:

(a) With regard to corporations and nonresident persons, "adjusted gross income derived from sources within Indiana", for the purposes of this article, shall mean and include:

- (1) income from real or tangible personal property located in this state;
- (2) income from doing business in this state;
- (3) income from a trade or profession conducted in this state;
- (4) compensation for labor or services rendered within this state; and
- (5) income from stocks, bonds, notes, bank deposits, patents, copyrights, secret processes and formulas, good will, trademarks, trade brands, franchises, and other intangible personal property to the extent that the income is apportioned to Indiana under this section or if the income is allocated to Indiana or considered to be derived from sources within Indiana under this section.

...

Therefore, if a taxpayer has income derived from sources in Indiana, which income is subject to income tax. In this case, the Department determined that Taxpayers had additional sales based on the sales and food and beverage tax audits. As discussed above, Taxpayer was properly subject to those additional sales. Thus, Taxpayer's protest regarding additional income tax due is denied.

FINDING

Taxpayer's protest is denied.

III. Tax Administration–Penalty.

Taxpayer requested that the Department abate the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1(a), the Department may assess a negligence penalty if the taxpayer:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty when "the taxpayer affirmatively establishes that the failure . . . was due to reasonable cause and not due to negligence." [45 IAC 15-11-2](#)(c). The taxpayer "must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section." *Id.* The Department is mindful that "[r]easonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case." *Id.*

In this instance, Taxpayer has demonstrated that its actions were reasonable as described in [45 IAC 15-11-2](#)(c). Taxpayer was unable to prove the proposed assessment wrong, but did provide some records. Also, Taxpayer did collect and remit some sales tax and food and beverage tax during the audit years. Thus, Taxpayer's request for penalty abatement is sustained.

FINDING

Taxpayer's protest of the negligence penalty is sustained.

SUMMARY

Taxpayer's protest regarding the assessment of additional sales tax and food and beverage tax is denied. Taxpayer's protest of additional income tax assessed is denied. Finally, Taxpayer's protest of the negligence penalty is sustained.

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